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05 UNITED STATES DISTRICT COURT  
06 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

07 DOROTHEA C., )  
08 Plaintiff, ) CASE NO. C20-5210-MAT  
09 v. )  
10 ANDREW M. SAUL, ) ORDER RE: SOCIAL SECURITY  
Commissioner of Social Security, ) DISABILITY APPEAL  
11 Defendant. )  
12 \_\_\_\_\_ )

13 Plaintiff proceeds through counsel in her appeal of a final decision of the  
14 Commissioner of the Social Security Administration (Commissioner). The Commissioner  
15 denied Plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an  
16 Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative  
17 record (AR), and all memoranda of record, this matter is AFFIRMED.

18 **FACTS AND PROCEDURAL HISTORY**

19 Plaintiff was born on XXXX, 1956.<sup>1</sup> She has master's degrees in recreational therapy  
20 and social work, and previously worked as a therapist. (AR 71, 237.)

21 Plaintiff applied for DIB in August 2016. (AR 204-12.) That application was denied

22 \_\_\_\_\_  
<sup>1</sup> Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

01 and Plaintiff timely requested a hearing. (AR 138-41, 143-35, 147-48.)

02 On November 6, 2018, ALJ Luke Brennan held a hearing, taking testimony from  
03 Plaintiff and a vocational expert. (AR 66-102.) On January 10, 2019, the ALJ issued a  
04 decision finding Plaintiff not disabled. (AR 43-52.) Plaintiff timely appealed. The Appeals  
05 Council denied Plaintiff's request for review on January 7, 2020 (AR 1-7), making the ALJ's  
06 decision the final decision of the Commissioner. Plaintiff appealed this final decision of the  
07 Commissioner to this Court.

### 08 **JURISDICTION**

09 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. §  
10 405(g).

### 11 **DISCUSSION**

12 The Commissioner follows a five-step sequential evaluation process for determining  
13 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it  
14 must be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had  
15 not engaged in substantial gainful activity since May 15, 2015, the alleged onset date. (AR  
16 45.) At step two, it must be determined whether a claimant suffers from a severe impairment.  
17 The ALJ found severe Plaintiff's diabetes mellitus II without complication with diabetic  
18 neuropathy; degenerative disc disease of the lumbar spine; obstructive sleep apnea; cervical  
19 spondylosis; and obesity. (AR 45-47.) Step three asks whether a claimant's impairments  
20 meet or equal a listed impairment. The ALJ found that Plaintiff's impairments did not meet  
21 or equal the criteria of a listed impairment. (AR 47-48.)

22 If a claimant's impairments do not meet or equal a listing, the Commissioner must

01 assess residual functional capacity (RFC) and determine at step four whether the claimant has  
02 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of  
03 performing sedentary work with additional limitations: she can lift/carry 10 pounds  
04 occasionally and less than 10 pounds frequently. She can sit for six hours in an eight-hour  
05 workday, and stand/walk for two hours in an eight-hour workday. She can never climb  
06 ladders, ropes, or scaffolds, and can occasionally climb ramps and stairs. She can  
07 occasionally kneel, balance, stoop, and crouch, but can never crawl. She can frequently  
08 reach, handle, and finger. She can have occasional exposure to vibration and hazards,  
09 including unprotected heights and dangerous machinery. (AR 48.) With that assessment, the  
10 ALJ found Plaintiff able to perform her prior work as a clinical therapist and marriage and  
11 family counselor. (AR 51-52.)

12 If a claimant demonstrates an inability to perform past relevant work, the burden shifts  
13 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make  
14 an adjustment to work that exists in significant levels in the national economy. Because the  
15 ALJ found Plaintiff capable of performing her past relevant work, the ALJ did not continue  
16 on to step five. (AR 52.)

17 This Court's review of the ALJ's decision is limited to whether the decision is in  
18 accordance with the law and the findings supported by substantial evidence in the record as a  
19 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means  
20 more than a scintilla, but less than a preponderance; it means such relevant evidence as a  
21 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881  
22 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which

01 supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
02 F.3d 947, 954 (9th Cir. 2002).

03 Plaintiff argues the ALJ erred in discounting her testimony and a treating physical  
04 therapist's opinion. Plaintiff also argues that if the ALJ's decision is not reversed outright  
05 under sentence four of 42 U.S.C. § 405(g), a subsequent favorable decision warrants remand  
06 under sentence six. The Commissioner argues that the ALJ's decision is supported by  
07 substantial evidence and should be affirmed, and that the subsequent favorable decision does  
08 not warrant remand.

09 Subjective symptom testimony

10 The ALJ summarized Plaintiff's allegations and explained that he discounted them  
11 because (1) Plaintiff alleged difficulty with movement and exertion, but also reported  
12 exercising often for 60 minutes at a time and worked with a personal trainer to lose weight;  
13 (2) Plaintiff's alleged limitations are inconsistent with her normal strength and normal gait  
14 upon examination; and (3) Plaintiff reported improvement with chiropractic care. (AR 49-  
15 50.) Plaintiff argues that these reasons are not clear and convincing, as required in the Ninth  
16 Circuit. *Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th Cir. 2014).

17 Plaintiff argues that the ALJ's reference to her exercising for 60 minutes at a time  
18 mischaracterizes the record, because she only reported exercising this long once. Dkt. 24 at  
19 10 (citing AR 455). Plaintiff also points to a different treatment note indicating that Plaintiff  
20 was exercising less and her stress levels were up. Dkt. 24 at 10 (citing AR 1003). The record  
21 contains many references to Plaintiff's frequent exercise throughout the record, however.  
22 (*See, e.g.*, AR 375 (Plaintiff reports going to "boot camp" with personal trainer), 463 (Plaintiff

01 reports going to an exercise class “nearly every day”), 466 (Plaintiff reports working with  
02 personal trainer 50 minutes six days a week), 925 (Plaintiff reports exercising 5-6 days/week),  
03 1003 (Plaintiff reports going to “boot camp” with personal trainer), 1019 (same).)  
04 Furthermore, the note cited by Plaintiff referencing decreased exercise nonetheless indicated  
05 that Plaintiff was continuing to participate in a boot camp with adapted exercises with her  
06 personal trainer, and noted that her recent hand surgery was one of the reasons why she was  
07 exercising less. (AR 1003.) Under these circumstances, the Court does not find that the  
08 ALJ’s description of Plaintiff’s exercise regimen misrepresents the record.

09 Plaintiff goes on to argue that the ALJ erred in referencing her normal objective  
10 findings while ignoring the context of those findings. Dkt. 24 at 10-11. Specifically, Plaintiff  
11 emphasizes that although there are some findings of normal strength and gait in the record,  
12 those same notes indicate absent reflexes and decreased sensation in arms and legs, and  
13 document various conditions. *Id.* Plaintiff has not shown that the ALJ erred in focusing on  
14 the normal strength and gait findings in the record because those findings are relevant to the  
15 ALJ’s evaluation of Plaintiff’s allegation of disabling neck and back pain. The ALJ also  
16 acknowledged Plaintiff’s neuropathy and explained how he accommodated it in the RFC  
17 assessment. (AR 51.) Plaintiff has not shown that the ALJ failed to appreciate the context of  
18 the entire record, when relying on certain normal findings.

19 Lastly, Plaintiff argues that the ALJ failed to assess her need to nap two hours per day.  
20 At the hearing, Plaintiff reported that four or five times per week, she naps in the afternoon.  
21 (*See* AR 80.) Plaintiff did not describe her naps as necessary and never reported a need for  
22 napping to providers, and, in fact, denied napping in a sleep questionnaire she completed in

01 May 2017. (AR 931.) She reported difficulty sleeping at many times in the record (*see* Dkt.  
02 24 at 11 (citing, *e.g.*, AR 583, 930-40, 1081, 1083)), and received treatment for her sleep  
03 apnea, but a need for napping is not well-documented in the record. The ALJ addressed  
04 Plaintiff's sleep apnea and indicated that he limited her exposure to hazards as a result (AR  
05 51), and Plaintiff has not shown that her daytime fatigue caused any more restrictive  
06 limitations, namely a need for a daily two-hour nap.

07 Because Plaintiff has not shown that the ALJ erred in assessing her testimony, the  
08 Court affirms this portion of the ALJ's decision.

09 Medical evidence

10 Plaintiff's treating physical therapist, McKinzy Bath, DPT, completed a form medical  
11 source statement in October 2018 describing Plaintiff's physical limitations. (AR 1394.) Ms.  
12 Bath opined that Plaintiff could sit or stand for 30 minutes each at a time (for up to one hour  
13 for each activity total per day), could walk for 15 minutes at a time (for up to four hours total  
14 per day), and must lie down for 30 minutes at a time (for up to two hours total per day). (AR  
15 1394.) Ms. Bath also opined that Plaintiff could frequently lift/carry five pounds,  
16 occasionally lift/carry 10 pounds, and rarely lift/carry 20 pounds. (AR 1394.) Lastly, Ms.  
17 Bath indicated that Plaintiff could perform most manipulative activities, except that she could  
18 not lift/pull arm controls with her left arm. (AR 1394.)

19 The ALJ gave partial weight to this opinion, crediting Ms. Bath's indications of  
20 lift/carry and manipulative limitations. (AR 51.) The ALJ found the sitting and standing  
21 limitations to be overstated, however, in light of (1) Plaintiff's ability to exercise, (2) the  
22 findings of normal strength and gait upon examination, and (3) Plaintiff's improvement with

01 physical therapy. (AR 51.) Plaintiff argues that these reasons are not germane, as required in  
02 the Ninth Circuit. *See Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

03 Plaintiff contends that, contrary to the ALJ's reasoning, she did not improve with  
04 physical therapy, but instead her symptoms only waxed and waned. Dkt. 24 at 6. This  
05 description of the treatment record is not persuasive, because the record indicates that  
06 Plaintiff's symptoms improved when she complied with the home exercise program  
07 prescribed by physical therapists, and that when she did not complete her exercises at home,  
08 her symptoms did not improve. (*See* AR 1080 (Plaintiff reports an increase in pain, and that  
09 she has not found any time to do her home exercises), 1083 (Plaintiff continues to report pain  
10 and difficulty completing home exercises), 1085 (Plaintiff reports some improvement and  
11 some persistent pain, while "semi compliant" with home exercises), 1087 (Plaintiff reports  
12 limited improvement, but also has not been compliant with home exercises), 1096 (Plaintiff  
13 reports some improvement, while "semi compliant" with home exercises), 1098 (Plaintiff  
14 reports some improvement, and that she "has tried to do some" of her home exercises), 1100  
15 (same), 1103 (even though Plaintiff is not compliant with home exercises, therapist notes she  
16 "continues to have positive response to therapy with decreased [pain] and improved flexibility  
17 after manual therapy"), 1105 (same), 1106 (same).) In light of this evidence, Plaintiff has not  
18 shown that the ALJ misconstrued Plaintiff's physical therapy records in finding that she  
19 generally improved with physical therapy.

20 Moreover, the various medical findings summarized by Plaintiff (Dkt. 24 at 6-9) do  
21 not undermine the ALJ's interpretation of Plaintiff's physical therapy experience or  
22 demonstrate that Plaintiff was as limited as Ms. Bath indicated. As discussed *supra*, Plaintiff

01 has not shown that the ALJ erred in focusing on the many normal objective findings in the  
02 record and Plaintiff's emphasis alternate portions of the record does not demonstrate any  
03 impropriety in the ALJ's reasoning. The Court therefore finds no error in the ALJ's  
04 assessment of Ms. Bath's opinion.

05 For these reasons, the Court rejects Plaintiff's request for relief under sentence four of  
06 42 U.S.C. § 405(g), and now turns to consider whether relief is warranted under sentence six.

07 Sentence six

08 Under the relevant portion of sentence six of 42 U.S.C. § 405(g), a court may at any  
09 time remand a case for "additional evidence to be taken before the Commissioner of Social  
10 Security, but only upon a showing that there is new evidence which is material and that there  
11 is good cause for the failure to incorporate such evidence into the record in a prior  
12 proceeding." In a sentence-six remand, the court makes no substantive ruling as to the  
13 correctness of the Commissioner's decision, but instead retains jurisdiction of the case until a  
14 new decision is made that is either fully favorable to the claimant or that permits review under  
15 sentence four of 42 U.S.C. § 405(g). *Melkonyan v. Sullivan*, 501 U.S. 89, 100 (1991). The  
16 claimant must show both that the new evidence is material to determining his or her disability  
17 and the existence of good cause for having failed to produce that evidence earlier. *Mayes v.*  
18 *Massanari*, 276 F.3d 453, 462 (9th Cir. 2001).

19 In this case, Plaintiff's subsequent application for DIB was approved in October 2020  
20 and Plaintiff was found eligible for benefits as of January 11, 2019, the day after the ALJ's  
21 unfavorable decision appealed here. *See* Dkt. 30, Ex. A; Dkt. 35 at 29. Plaintiff argues that  
22 because she was found disabled as of one day after the ALJ's decision, and because some of



01 the records submitted along with the subsequent application were part of the record before the  
02 ALJ in the decision currently appealed, this case should be remanded under sentence six to  
03 permit the ALJ to consider and reconcile the decision denying benefits with the subsequent  
04 favorable decision. Dkt. 31.

05       The Ninth Circuit has published two decisions addressing whether a subsequent  
06 favorable decision dated one day after a prior unfavorable ALJ decision warrants remand to  
07 permit the ALJ to reconcile the disparate outcomes. In *Bruton v. Massanari*, the Ninth Circuit  
08 found that because the plaintiff's "second application involved different medical evidence, a  
09 different time period, and a different age classification[.]" the subsequent favorable decision  
10 "is not inconsistent with the first ALJ's denial of [plaintiff's] initial application." 268 F.3d  
11 824, 827 (9th Cir. 2001). Thus, the *Bruton* court held that a sentence-six remand was not  
12 necessary.

13       In *Luna v. Astrue*, the Ninth Circuit distinguished *Bruton* on factual grounds: the  
14 plaintiff had provided notice of a subsequent favorable decision, but did not submit any  
15 information about what evidence or reasoning supported that decision. See 623 F.3d 1032,  
16 1034-35 (9th Cir. 2010). Because of the close proximity of the two disparate decisions, the  
17 *Luna* court found that there was a "'reasonable possibility' that the subsequent grant of  
18 benefits was based on new evidence not considered by the ALJ as part of the application[.]"  
19 and thus a sentence-six remand would be appropriate to determine whether the subsequent  
20 favorable decision impacted the first decision. *Id.*

21       The facts of this case are distinguishable from *Luna* because Plaintiff has submitted to  
22 this Court all of the medical evidence considered by the Commissioner in finding Plaintiff

01 disabled. *See* Dkt. 35. Thus, this Court is not faced with the *Luna* ambiguity suggesting that  
02 further fact-finding would be needed. This case is more analogous to *Bruton*, although the  
03 medical evidence considered by the Commissioner in finding Plaintiff disabled is not entirely  
04 distinct from the evidence referenced in the prior ALJ decision, and there is no suggestion that  
05 a change in age category contributed to the finding of disability.

06 Plaintiff argues that the fact that the Commissioner considered some of the same  
07 evidence as the ALJ in finding Plaintiff disabled weighs in favor of a sentence-six remand  
08 (Dkt. 37 at 3), but the Court disagrees. First and foremost, the possibility of drawing opposite  
09 conclusions from the same evidence does not suggest that the prior ALJ decision was  
10 incorrect or must be reconciled. *See Morgan v. Comm’r of Social Sec. Admin.*, 169 F.3d 595,  
11 599 (9th Cir. 1999) (“Where the evidence is susceptible to more than one rational  
12 interpretation, it is the ALJ’s conclusion that must be upheld.”). Moreover, new evidence  
13 supporting the subsequent favorable decision indicates that Plaintiff reported that her mental  
14 symptoms had worsened since the January 2019 ALJ decision. *See, e.g.*, Dkt. 35 at 33 (July  
15 2020 psychological examination: “Claimant indicates that her symptoms have gotten worse in  
16 the last year.”). In the 2019 ALJ decision, the ALJ found that Plaintiff’s mental conditions  
17 were not severe, and Plaintiff does not assign error to that finding. (AR 46-47.) The  
18 subsequent favorable decision found that Plaintiff had severe mental conditions and that her  
19 RFC was more limited than the ALJ had found. *See* Dkt. 35 at 13, 15-19.

20 Thus, the disparate outcomes are easily reconcilable on the record before this Court  
21 given the different evidentiary bases, and the Court finds that the subsequent favorable  
22 decision is not material to the ALJ’s 2019 decision. *See, e.g., Francis v. Saul*, 2020 WL

5073935, at \*4-5 (E.D. Cal. Aug. 27, 2020) (finding that because a subsequent favorable decision was based on the emergence of new severe impairments that led to a more restrictive RFC assessment, “the record thus offers a clear explanation for why plaintiff was found not disabled” in the first decision but found disabled in a later determination).

**CONCLUSION**

For the reasons set forth above, this matter is AFFIRMED. Plaintiff’s alternative motion to remand is DENIED (Dkt. 31), and Plaintiff’s motion to amend the noting date of the motion to remand is DENIED as MOOT (Dkt. 33).

DATED this 9th day of March, 2021.



Mary Alice Theiler  
United States Magistrate Judge